

TING LING KIEW & ANOR.

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v.

TANG ENG IRON WORKS CO. LTD.

SUPREME COURT, BORNEO

ABDUL HAMID OMAR LP

MOHD. JEMURI SERJAN CJ (BORNEO)

MOHD. YUSOFF MOHAMED SCJ

[CIVIL APPEAL NO. 02-29-90]

29 MAY 1992

b

CIVIL PROCEDURE: *Originating summons for declarations - Allegation of fraud - Conflicting affidavit evidence - Whether application can be heard summarily - Can Court interfere if decision was wrong.*

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On 19 June 1984 Har Lee Enterprise Sdn. Bhd. (HLE) and the respondent entered into two building contracts to construct a complex. However, dispute arose on the completion of the said works. On 20 May 1988 the arbitrator made an award in favour of the respondents. To enforce the award the respondents examined the appellants, directors of HLE, pursuant to judgment debtor summons. The facts unearthed by the examination prompted the respondents to bring this application.

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The trial Judge dealt with the application summarily under O. 88 r. 2(1) Rules of the High Court 1980 ("RHC"). The appellant's Counsel argued that the trial Judge should have gone under O. 28 r. 8(1) RHC especially in the light of the plea of fraud and the conflicting affidavit evidence.

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Held:

[1] The conflicts in the evidence can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross examined on their evidence which, however, is not possible in proceedings begun by originating summons.

[2] In the present case where fraud or intention to default is the central issue particulars of fraud must be specifically pleaded and it is obvious that the particulars of the fraud are absent in the affidavit of the manager of the respondent company.

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[3] The Judge is not precluded in the exercise of his discretion from making an order that the proceedings should be continued as if begun by writ pursuant to O. 28 r. 8(1) RHC bearing in mind also O. 5 r. 2(b) RHC. Indeed, it is within his absolute discretion and he is justified to do so in the circumstances of this case in order to resolve the conflicts of affidavit evidence and reach a well balanced decision.

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[Appeal allowed]

[Bahasa Malaysia Translation of Headnote]

PROSEDUR SIVIL: *Saman pemula untuk perisytiharaan - Pengataan fraud - Keterangan affidavit bercanggah - Samada permohonan boleh didengar terus - Bolehkah Mahkamah campurtangan jika keputusan adalah salah.*

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Pada 19 Jun 1984, Har Lee Enterprise Sdn. Bhd. (HLE) dan responden telah menandatangani dua kontrak bangunan bagi membina sebuah kompleks. Walau bagaimanapun pertikaian timbul atas penyudahan kerja-kerja tersebut. Pada 20 Mei 1988 penimbangtara telah membuat suatu

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- a** award yang memihak kepada responden. Bagi menguatkuasakan award tersebut, responden memeriksa perayu, pengarah-pengarah HLE, menurut Saman Penghutang Penghakiman. Fakta-fakta yang didapati hasil daripada pemeriksaan tersebut membuat responden membawa permohonan ini.

- b** Hakim perbicaraan tersebut menguruskan permohonan tersebut secara terus di bawah A. 88 k. 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 ("KKMT"). Peguam perayu menghujahkan bahawa Hakim perbicaraan tersebut sepatutnya berpandukan kepada A. 28 k. 8(1) KKMT terutamanya memandangkan kepada pli fraud dan keterangan affidavit bercanggah.

Diputuskan:

- c** [1] Percanggahan dalam keterangan hanya boleh diselesaikan dengan betul dan memuaskan jika keterangan lisan dikemukakan dan saksi-saksi diperiksa balas atas keterangan mereka, yang mana namun begitu tidak mungkin dalam prosiding yang dimulakan melalui saman pemula.

[2] Dalam kes semasa di mana fraud atau niat untuk menipu ialah isu utaman, butir-butir mengenai fraud mestilah dihidkan secara khusus dan jelas sekali bahawa butir-butir mengenai fraud tidak terdapat dalam affidavit pengurus syarikat responden.

- d** [3] Hakim berkenaan tidak dihalang dalam menggunakan budibicaranya untuk membuat suatu perintah bahawa prosiding tersebut haruslah disambung seolah-olah ianya dimulakan melalui writ menurut A. 28 k. 8(1) KKMT dan juga mengambil ingatan akan A. 5 k. 2(b) KKMT. Memang ianya berada dalam lingkungan budibicara mutlakanya dan beliau melihat kepada keadaan-keadaan kes ini untuk membolehkan beliau menyelesaikan percanggahan dalam keterangan affidavit dan mencapai suatu keputusan yang seimbang.

- e** [Rayuan dibenarkan.]

Cases referred to:

- f** *In re Patrick and Lyon Ltd.* [1988] 1 Ch 786 (**cit**)
In re Augustus Barnett [1986] BCLC 170 (**cit**)
Wallingford v. Mutual Society [1879-80] 5 AC 685 (**cit**)
American Cyanamid v. Ethicon Ltd. [1975] AC 396 (**cit**)
Eng Mee Yong & Ors. v. V.Letchumanan [1979] 2 MLJ 212 (**cit**)
Tay Beng Chuan v. Official Receiver and Liquidator [1987] 2 MLJ 419 (**fol**)
In re Deadman, Decd, Smith v. Garland & Ors. [1971] 1 WLR 426 (**fol**)
In re 462 Green Lane, Ilford Gooding v. Borland [1971] 1 WLR 138 (**not fol**)

Legislations referred to:

- g** Companies Act 1965, ss. 304, (1)
Land Registration Act 1925 [UK], ss. 54, 55
Land Registration Rules 1925 [UK], rr. 218, 220(4)
Rules of the High Court 1980, O. 5 r. 2(b), O. 18, O. 28 r. 8(1), O. 88 r. 2(1)
Rules of the Supreme Court [Sing], O. 93 r. 10
Land Code (Cap 81) (Sarawak), ss. 148(2), 152
Companies Act [Sing], s. 305

- h** **Other source referred to:**

Companies Act of Singapore, An Annotation; Walterwoon, p. 625

For the appellants - Cecil Abraham and K.Y. Lin; M/s. K.Y. Lin & Co.

For the respondents - Ernest Chua; M/s. Ernest Chua & Co.

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JUDGMENT

Mohd. Jemuri Serjan CJ (Borneo):

In the High Court the plaintiffs, Tang Eng Iron Works Co. Ltd. (respondents before us) took out an originating summons under O. 88 r. 2 of the Rules of the High Court 1980 in an application under s. 304(1) of the Companies Act 1965 seeking the following declarations:

- (1) A declaration that the business of Har Lee Enterprise Sdn. Bhd. has been carried on with intent to defraud creditors of the defendants;
- (2) A declaration that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe shall be personally responsible without any limitation of liability, for all of the debts or other liabilities of the said Har Lee Enterprise Sdn. Bhd.;
- (3) An order that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe do repay to the plaintiffs the sum comprised in the Arbitration Award dated 20 May 1988, viz the sum of Malaysian Ringgit Four Million One Hundred And Sixty-Five Thousand One Hundred And Forty-Five And Cents Eighty (RM4,165,145.80) only together with interest thereon at the rate of 8% per annum from the date of the said Arbitration Award until the date of full and final settlement; cost of the plaintiffs and of the said Arbitration; costs of the Arbitration Award taxed at RM25,245.45; costs of the plaintiffs in originating summons No. KG. 156 of 1988 and judgment therein.
- (4) Costs of the application; and
- (5) Any further or other reliefs.

The learned Judge held that the provisions of s. 304 of the Companies Act 1965 were satisfied and accordingly made the order in terms of the originating summons. Hence this appeal.

The circumstances under which the application under s. 304(1) arose can be gathered from the facts as they were found by the High Court and from the affidavits of the parties in this case. Har Lee Enterprise Sdn. Bhd. ('HLE') was incorporated under the provisions of the Companies Act, 1965 on 9 December 1980 with a fully paid-up share capital of RM3,600,000 and has a registered office at Lot 219, Section 61, 1st Floor, Ban Hock Road, Kuching. By an agreement dated 5 April 1984 the 1st defendant (1st appellant before us) and one Yeh Hsin Tsan bought over all the shares of HLE for a sum of RM6.4 million of which RM100,000 each is to be paid by Yeh Hsin Tsan, Kueh Eng Mong and Ting Ling Hoe; RM4,100,000 is to be paid by the 1st appellant and the balance of RM2 million is to be paid in kind by the purchasers constructing, completing and conveying all the (7) parcels of office blocks located on the 8th floor of the Jade Tower Commercial Complex to the vendors. The 1st and 2nd appellants were appointed managing director and secretary of the board of directors respectively on 14 June 1984, the other director of HLE being Hoo Tung Kwong @ Robin Hoo, Chong Kia Hoi, Sim Kwan Meng and Ngu Bek Sing who resigned on 11 June 1985 and was succeeded by Kueh Eng Mong on the same date. HLE is the registered proprietor of a parcel of land situated at Jalan Tunku Abdul Rahman and known as Lot 276, Section 48 Kuching Town Land District containing an area of 1516, square meters which, however, is subject to a legal charge in favour of Bank Utama (M) Bhd. to secure a total loan of RM1,150,000. The said land is the only principal asset of HLE and valued at RM4,827,872 as at 31 December 1982. However, the value of the land had been fluctuating throughout the years and as at 1 January 1987 it was valued at RM10,201,833. There was a sharp down-turn in the value of the land when it was revalued at RM3,790,000 only as on 18 January 1988. The approval having been obtained from the relevant authorities for the erection of office commercial cum residential complex, to be known as Jade Tower Commercial Complex,

- a* comprising 17 storeys together with 3 basements, the respondents on 19 June 1984 entered into two building contracts with HLE for the construction and completion of foundation and basement works of the proposed Complex. A dispute arose between the respondents and HLE on the completion of the said works, and pursuant to the provisions of the contract the dispute was referred to arbitration in respect of the claim brought by the respondents against HLE for the work done on the said property. On 20 May 1988 the Award which was in favour of the respondents was published. Under the Award HLE was to pay to the respondents within 14 days from the date the Award was taken up by either party a sum totalling RM4,165,145.90 only as well as the costs of the respondents and costs of the Arbitration which were yet to be taxed, and further to reimburse the respondents with a sum of RM25,245.45 being taxed and settled costs of the Award. On the application of the respondents, the High Court on 19 July 1988 ordered that the respondents be at liberty to enforce the said arbitration Award in the same manner as a judgment or order to the same effect and that HLE pay the taxed costs of the application and any judgment which might be entered thereunder. The Award was handed down on 20 May 1988.

The respondents were never paid for their work. In order to seek payment, the respondents applied for examination of the 1st and 2nd appellants as responsible officers of HLE. The facts unearthed by the examination prompted the respondents to bring this application.

- d* In the course of the examination of the 1st and 2nd appellants, pursuant to the judgment dated 19 July 1988 as judgment debtors on 14 September 1988, it was revealed that HLE on 20 December 1984 had charged the land to Public Finance Bhd. for Malaysian Ringgit Four Million (RM4,000,000). Under the memorandum of charge, the RM4 million loan was to be disbursed in the following manner:
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- (1) A sum not exceeding RM1,200,000 to be released through the chargee's solicitors for the redemption of the said land from Bank Utama (M) Bhd.
 - (2) The balance of the loan amount to be released progressively against construction work done up to 90% as certified by a qualified architect or consultant engineer acceptable to the chargee.
- f* The said RM4 million loan under the terms of the charge was meant for the financing and construction of a 20-storey commercial/office/apartment complex. It is interesting to note that in Clause 1 of the charge it is provided that the amount of the loan lent to or financed for the benefit of the chargor by the chargee by progressive releases in the manner and the terms to the extent and for so long as the chargee may in its sole and absolute discretion deem fit as set out in the First Schedule of Disbursements. The First Schedule stipulates the manner in which disbursements of the loan are to be met. The First Schedule was amended with the agreement of both parties in the following manner:
- g*
- (1) Public Finance Berhad (PFB) shall release RM1,197,460.38 to Bank Utama (M) Berhad for redemption of land titles to Lot 276, Section 48, Kuching, Sarawak, upon which we shall furnish you the undermentioned documents:
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- (a) Auditor's certification that the total sales position of HLE in respect of building units in the proposed Jade Tower building is approximately RM14.6 million as at 14 January 1985.
 - (b) That notwithstanding the earlier approval of PFB to release the balance sum of the RM4 million loan, subsequent to the first release for redemption of the land titles, to be against 90% of the architect's certificates of construction work done, HLE undertakes to accept a revised mode of release for the balance sum to be as follows:
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- i) RM1.5 million shall be against the first architect's certificates of construction work done of not less than RM2.38 million;
- ii) the balance sum of about RM1.302 million shall be against 50% of the subsequent architect's certificates of construction work done.

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The examination of the appellant also disclosed that RM1.5 million was released by the Public Bank Bhd. to the appellant but it was admitted by the 1st appellant that this sum of money was paid to one T.R. Garak anak Mud for the purpose of applying for a timber concession. It was also disclosed during the examination that an extraordinary meeting of the directors of HLE was called on 12 January 1985 to discuss and authorise the advance of RM1.5 million to T.R. Garak anak Mud for acquiring forest concession in Sarawak at which a resolution to that effect was carried.

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It is common ground that an order was obtained on 12 October 1987 by Public Finance Bhd for the sale of the said land by auction. Apparently, there was no bid on the date of the auction. It was also common ground that the said land was eventually sold to a company, Tolaz Sdn. Bhd. on the 25 May 1988 for actually RM3.5 million although in his affidavit the respondents claimed that it was for RM3 million only. On the following day the memorandum of transfer was registered.

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Pursuant to the provisions of the Companies Act 1965, HLE accordingly submitted annually its statements of accounts and these statements of accounts were produced in the Court below. The statements of accounts from 1982 up to 1987 were produced as exhibits. A scrutiny of these statements of accounts showed that HLE commenced business on 1 January 1982, the principal activity being property development and its principal asset being Lot 276. The statements of accounts also revealed that the said land was valued at RM4,827,872 as at 31 December 1982; RM5,037,888 as at 31 December 1983; RM7,195,557 as at 31 December 1984 and RM9,685,209 as at 31 December 1985. However, as at 31 December 1986 the same land was valued at RM10,201,833 and the value seemed to soar up to RM11,017,570 as at 31 December 1987. At the request of the chargee, Public Finance Bhd, C.H. Williams, Talhar, Wong & Yeo Sdn. Bhd. produced another valuation report on Lot 276 on 18 January 1988 and after taking into consideration prevailing values, the size, locality and physical and legal nature of the property, it was assessed at RM3,790,000, a drastic downward trend in the value of this property. This is a drastic contrast to the value of the land as at 31 December 1987 and shown in the statement of accounts of HLE for the year ending 31 December 1987 and even more significantly lower than the valuation made by the same firm on 1 September 1984. It was then valued at RM7,000,000 with a forced sale value of RM5,600,000. It is also obvious from these Statements of Accounts that HLE had not received any income at all throughout these years for the obvious reasons that the building on which HLE expected to make profits had not yet been constructed and therefore no sales were recorded. It is not an unusual phenomenon in the property development business.

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In the 1985 statement of accounts which was submitted to the Registrar of Companies in Kuala Lumpur, under current assets it was disclosed that a sum of RM1,524,726 was recorded as amount owed by sundry debtors but there were no details as to who the debtors were and the amounts owing by each debtor. However, another set of statement of accounts for the year ended 31 December 1985 was produced at the hearing of Originating Summons No. KG. 156 of 1988 during which both appellants were examined. An amount of RM184,726 was recorded as the amount owed by sundry debtors and a further sum of RM1,340,000 by the directors of HLE. There seems to be two different versions of the 1985 statement of

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- a* accounts under the heading of current assets. While the statement of accounts submitted to the Registrar of Companies in Kuala Lumpur showed a sum of RM1,524,726 was described as amount owed by sundry debtors, the statement of accounts produced at the proceedings in originating summons No. KG. 156 of 1988 showed the amount was split under two headings that is RM184,726 being under sundry debtors while a sum of RM1,340,000 under directors' current account. On account of the discrepancy between the two statements of accounts on
- b* the same item, an allegation was made that the directors procured for themselves the sum of RM1,340,000 from HLE's fund when at that time HLE was already owing the respondents a sum of RM4,165,145.80 which had not been paid by HLE thereby perpetrating a fraud on the respondents. The nature and the circumstances of the payment of this sum of money was never ascertained. It was alleged by the respondents that the Statements of Accounts lodged with the Registry of Companies in Kuala Lumpur was doctored to conceal the fact that the
- c* sum of RM1,340,000 was owed by the directors of HLE. It is interesting to note that at the inception of HLE a glowing report on the property market in Kuching was presented to HLE by highlighting the huge profit of RM9.5 million before tax if the Jade Tower Commercial Complex were to be completed in time thus making the project a viably lucrative venture.
- d* Encik Cecil Abraham for the appellants took up the point on procedure and practice and submitted that the learned trial Judge erred in law in dealing with the application summarily by an originating summons under O. 88 r. 2(1) when he should have resorted to O. 28 r. 8(1) of the Rules of the High Court, 1980, especially in the light of the plea of fraud and the conflicting affidavit evidence. He set out instances of the conflicts of evidence in the affidavit of Encik Rex Chen Jui Yuen the regional manager of the respondent company and of Encik Ting Ling Kiew, the 1st appellant. For instance, with regard to the three instances on which
- e* the learned trial Judge based his decision there is conflicting evidence. In para. 9 of his affidavit Encik Rex Chen Jui Yuen stated that the property was sold to Tolaz Sdn. Bhd. for RM3 million only whereas according to the memorandum of transfer dated 25 May 1988 the property was transferred to Tolaz Sdn. Bhd. for the sum of RM3.5 million. In para. 11 of his affidavit Rex Chen Jui Yuen affirmed that he was perturbed by the speed with which the property was disposed of to a company, that is Tolax Sdn. Bhd. with an authorised share capital of only RM25,000. It was transferred to Tolaz Sdn. Bhd. barely five days after the
- f* arbitration award was published by the arbitrator which was on 20 May 1988. However, in para. 16 of his affidavit Encik Ting Ling Kiew claimed that an order for the sale by auction of the said property was obtained on 12 October 1987 and therefore the disposal of the property was not in fact carried out in haste as alleged because it was transferred more than seven months after the order of sale by auction. Similarly, on the statement of accounts of HLE for the year ending 31 December 1985 it was alleged in paras. 21 to 27 of Encik Rex
- g* Chen Jui Yuen's affidavit that there was a complete absence in the statement of accounts of the sum of RM1.5 million advanced to T.R. Garak anak Mud, but according to the learned Counsel for the appellants it was reflected in the statement of accounts for the year ending 31 December 1987. It seems to us that the area of conflict in the statement of accounts for that year was the allegation that the set of statement of accounts for that year lodged with the Registrar of Companies in Kuala Lumpur was doctored so as to conceal the fact that the
- h* directors of HLE owed that company a sum of RM1,340,000 which fact was disclosed in the set of statement of accounts for that year produced in the High Court during the examination of the 1st appellant. On the other hand, the 1st appellant explained in para. 22 of his affidavit that according to their accountant there was a mix-up between the draft and the final and approved statement of accounts at the time the statements were filed with the Registrar of
- i* Companies in Kuala Lumpur.

Apart from the various inconsistencies in the affidavits of the appellants and the respondents in the Court below, we also observe other matters which have not been satisfactorily explained in the affidavits and could be resolved if the proceedings have been begun by writ. In para. 28 of his affidavit Rex Chen Jui Yuen stated that the 1st appellant claimed in his testimony that the RM3 million from Tolaz Sdn. Bhd. being the proceeds of the sale of the said property, was paid directly towards the settlement of the monies owing to Public Finance Berhad. However, he questioned the credibility of the testimony but made no effort to controvert it in the High Court below and, besides, the veracity or otherwise of this testimony had not been challenged. It would appear that the testimony referred to here is the testimony of the 1st appellant when he was examined as judgment debtor in connection with the judgment dated 19 July 1988. Considering that the said land was originally the subject of a High Court order for sale by auction under s.148(2)(c) of the Sarawak Land Code (Cap.81) and the failure of the sale, we would have thought that evidence should be adduced as to what transpired thereafter. It was not established whether the sale of the land was by private treaty with the consent of the Court after the failure of the sale by auction pursuant to Court order dated 12 October 1987 and no evidence was adduced either to give an account of what transpired after the auction and subsequent to the unsuccessful auction. Under s. 152 of the Sarawak Land Code (Cap 81) if no bid has been made at or above the reserve price, it is lawful for the Court to adjourn the sale and to order that the land be again put up for auction with the same or reduced reserve price. Thus, the circumstances under which the land was sold to Tolaz Sdn. Bhd. were never disclosed before the Court and we are in no position to determine the validity or otherwise of the sale which, however, was never raised in the Court below. What was questioned by the respondents was the haste with which the land was disposed of and the questionability of the incorporation of Tolaz Sdn. Bhd. and the motive for the sale, drawing thereby the adverse inference of fraudulent intent. Surely, this is good enough reason for the matter to go for proper trial, bearing in mind always that where an allegation of fraud has been made the onus is upon the person who seeks to make good the charge (*In re Patrick And Lyon Ltd.* [1933] 1 Ch. 786) and considering also the meagre materials on this score available before the Court.

Another pertinent observation is in respect of the averment of the appellants that a sum of RM1.5 million was paid to T.R. Garak anak Mud for the purpose of acquiring a timber concession. In para. 18 of his affidavit Rex Chen Jui Yuen deposed that he believed that it was not official, legal or proper for a company to apply for a timber concession through a Bumiputra third party because such a ploy represented a fraud perpetrated against the Minister of Forests. Secondly, if indeed, the application had succeeded and a timber licence was issued in the name of the said Bumiputra third party, the said company would not visibly be seen to have a stake therein and thirdly and more importantly it would have been well-nigh impossible for creditors of the said company to trace the said company's funds to the said Bumiputra third party as the latter and the company would be separate legal entities, bearing no nexus with the said company's creditors in general and the respondents in particular. Lastly, such an exercise on the part of the said company by its very illegality was *ultra vires* the said company and the appellants by inveigling the said company so to act, had knowingly been parties to fraudulent trading. To this the appellants' reply was that it was within HLE's memorandum and articles of association to carry out timber business, and in view of the poor property market it would be in the interest of HLE to go to other line of business such as timber extraction. Assuming without deciding this is true, if the application is successful it would help to swell the company's fund which at that time was almost depleted and it seems to us to be a plausible explanation. It is more consistent with innocent

- a* intent and so no inference of dishonesty may be drawn. See *In re Augustus Barnett* [1986] BCLC 170 @ 175. The question whether the sum of RM1.5 million was in fact paid to T.R. Garak anak Mud for the purpose of securing a timber concession for HLE or for himself or whether, if assuming the timber concession was granted, HLE would be a contractor to extract timber in the concession area, could not be looked into in detail to establish the truth or otherwise of the explanation under these proceedings. More importantly, evidence is lacking
- b* and no materials are available to establish whether the application is on behalf of HLE or on T.R. Garak anak Mud's own behalf and whether it is illegal for HLE to obtain a timber concession or to become a contractor in the event timber licence is granted to somebody else. What seems to be common in Sarawak and perhaps elsewhere in Malaysia is timber licence may be obtained through a third party which may have some influence with the authorities. All things are possible and what is needed here is concrete evidence without
- c* which we do not think general inferences should be drawn from facts inferred from general averments. No discovery of HLE's memorandum and articles of association was possible in the proceedings under the originating summons which is vital to establish the fraudulent intent since there is an allegation of fraud in respect of the payment of RM1.5 million to T.R. Garak anak Mud who was never given the opportunity to testify on this matter. The matter was dealt with in a very unsatisfactory and summarily manner, thereby causing a grave injustice to the appellants.
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- The other matter that should be looked into in detail by the Court entailing the presence of witnesses to be examined and cross examined, discoveries and production of relevant documents connected therewith relates to the statements of accounts of the company ending 31 December 1985. The respondents made serious allegation against the appellants for submitting two separate statements of accounts for 1985 - one to the Registrar of Companies
- e* in Kuala Lumpur and one before the High Court in which certain material facts were suppressed. We have earlier on adverted to the items in the two statements of accounts which were claimed to be inconsistent and the allegation of the suppression of material facts therein. The appellants explained how this apparent inconsistencies occurred, but unfortunately the accountant who prepared the statements of accounts was never asked to file an affidavit to depose to the true circumstances under which the inconsistencies came
- f* into existence. It was only the 1st appellant who in his affidavit claimed that the accountant, one Mr. Wong Siew Chow of Wong Siew Chow & Co., certified accountants, approved company auditors, first sent a draft account to HLE and then he drew up a final account and there was a mix-up between the draft account and the final account during the filing with the Registrar of Companies. (See para. 22 of the 1st appellant's affidavit at p. 80 of the record of appeal.) In an ordinary proceeding commenced by a writ Mr. Wong Siew Chow
- g* would definitely have to be subpoenaed to give evidence on such an important matter as an allegation of fraud or fraudulent representation because it is only he who could explain what actually happened. An inference on facts which themselves could not therein be established as proved is in our view not justified. As Hoffmann J said in *Re Augustus Barnett (supra)* at p. 175:

- h* ... An intention thus qualified is not an adequate basis for a belief that there is good reason for thinking that funds will become available to pay the company's debts as they fall due and can therefore give rise to an inference that there was an intent to defraud - see *R. v. Grantham* [1984] 3 All ER 166 [1984] BCLC 270, [1984] QB 675. I do not accept this form of reasoning, which involves translating the actual facts pleaded into generalities and then drawing inferences from those generalities rather than the facts themselves.

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It would appear that the respondents relied firstly, on the affidavit of Rex Chen Jui Yuen, the regional manager of the respondent company, which in itself does not, in our view, adequately contain all the evidence of the carrying on of the business of HLE on the part of the appellants with intent to defraud their creditors, and secondly, on the impugned statements of accounts and drew adverse inference there of fraudulent intent. In other words, from the viewpoint of the respondents the statements of accounts speak for themselves as to the truth therein without the necessity of further proof, being themselves in the nature of intrinsic evidence. We are not disposed to agree with such a sweeping general proposition for the purpose of establishing intent to defraud on the part of the appellants.

Unquestionably, these conflicts in the evidence can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross examined on their evidence which, however, is not possible in proceedings begun by originating summons. To add to the uncertainty of the facts the deponents of both affidavits of the appellants and the respondents were not cross examined to ascertain the veracity or otherwise of their evidence. It would seem that both parties were contented to rest their case on their affidavits only where such affidavits do not unequivocally bear testimony conclusively and positively to the various allegations but are themselves open to more than one interpretation. In such a case as the present where fraud or intention to defraud is the central issue we agree that the particulars of fraud must be specifically pleaded and it is obvious that the particulars of the fraud are absent in the affidavit of the manager of the respondent company. On this point we find strong support in the case of *Wallingford v. Mutual Society* [1879-1880] 5 AC 685, particularly in the speeches of Lord Selborne (Lord Chancellor), Lord Hatherley and Lord Watson at p. 697. Lord Selborne said:

With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent ...

At p. 701 Lord Hatherley said:

There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Lord Watson is more specific and at p. 709 he said:

My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of Common Law, I think the terms of O. XIV would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

- a** In any case it is most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence and in this respect we would echo the words of Lord Diplock in *American Cyanamid v. Ethicon Ltd.* [1975] AC 396 at p. 407:

It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

b

The same Law Lord spoke in almost similar vein in *Eng Mee Yong & Ors. v. V.Letchumanan* [1979] 2 MLJ 212 at 216:

Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.

c

- d** Encik Ernest Chua, Counsel for the respondents, in reply submitted that O. 28 r. 8(1) was not relevant and that the proceedings were correctly commenced under O. 88 r. 2(1), arguing that there was nothing in O. 88 r. 2(1) which required that proceedings under s. 304(1) be begun by writ. In his view the learned Judge had considered O. 28 r. 8(1) but it was clear that it did not appear to the learned Judge in the proceedings before him that the matter should be continued as if it had been begun by writ. In other words, his argument was that the learned Judge had considered O. 28 r. 8(1) but decided not to exercise his discretion to order the proceedings to continue as if they had been begun by writ. We are, regrettably, unable to share this view with the same gravity because, having regard to the various unsatisfactory aspects of the case that we have alluded to in detail earlier on, the better discretion to exercise is for the learned Judge to order the proceedings to continue pursuant to O. 28 r. 8(1).

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- f** While we accept Encik Cecil Abraham's submissions that from the point of procedure and practice and for the reasons we have explained above this is a proper case for the application of O. 28 r. 8(1) we do not, however, lend countenance to his submission that we should apply the principle laid down in the English Companies (Winding-up) Rules 1948 nor their successor the Insolvency Rules 1987 for obvious reasons.

g

- g** We were referred to the case of *Tay Beng Chuan v. Official Receiver and Liquidator* [1987] 2 MLJ 419, a Court of Appeal case which principally lays down a ruling that where a trial Judge was wrong in the exercise of his discretion under O. 28 r. 8(1) when he failed to order pleadings, discovery and a full trial on the merits but heard the application under s. 305 of the Singapore Companies Act summarily, thereby resulting in an injustice or a miscarriage of justice the Court of Appeal would interfere if clearly satisfied that the decision was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or the other. In that case the Singapore Court of Appeal having regard to all the circumstances of the case ordered pursuant to Rules of the Supreme Court O. 28 r. 8(1) the proceedings to continue as if they had been begun by a writ of summons and the parties hereto deliver pleadings in accordance with O. 18.

h

- i** In dealing with the question of procedure and practice in relation to O. 28 r. 8(1) the learned Judge in the Court below seemed to take the view that since HLE had not been wound up the appropriate order to apply is O. 88 r. 2(1), relying on a passage at p. 625 of Walter Woon's book entitled "*Companies Act of Singapore: An Annotation*". The passage reads:

i

Where the company is not being wound up an application under this section should be made by originating summons: Rules of the Supreme Court, 1970, O. 88 r. 2(1).

a

Probably the learned Judge was also persuaded to take that view because the 1st appellant in para. 3(d) of his affidavit stated that there was no provision either under the Companies Act or the High Court Rules that the respondents could commence this action by originating summons. The learned Judge is correct in quoting O. 88 r. 2(1) of the Rules of the High Court 1980 in answer to the appellants' argument on that score but in our view he is not precluded in the exercise of his discretion from making an order that the proceedings should be continued as if begun by writ pursuant to O. 28 r. 8(1) bearing in mind also O. 5 r. 2(b). Indeed, it is within his absolute discretion and he is justified to do so in the circumstances of this case in order to resolve the conflicts of affidavit evidence and reach a well-balanced decision.

b

In this respect it is illuminating to refer to the case of *In re Deadman, Decd. Smith v. Garland & Ors.* [1971] 1 WLR 426. The plaintiff by an originating summons sought to determine the question whether the gift of residue to the 3rd defendant, the testator's other daughter, was satisfied or adeemed wholly or *pro tanto* by a gift to the 3rd defendant of certain securities made by the testator during his lifetime soon after making the will. When evidence was sworn certain facts came to light, and as a result it was sought to amend the summons by adding, *inter alia*, an allegation of undue influence. The amendment also sought necessary consequential orders, including an order under RSC O. 28 r. 8. On the 3rd defendant's objection on the ground that since the proposed amendments amounted to allegations of fraud the action should be begun by writ pursuant to O. 5 r. 2(b). It was held that assuming that the action as amended would be one based on an allegation of fraud it would become an action which had to be begun by writ pursuant to RSC O. 5 r. 2(b), but that rule did not prevent an action begun by originating summons from being continued, under O. 28 r. 8, as if begun by writ where the original proceedings were amended to include an allegation of fraud; and, accordingly, the amendment should be allowed and the action continued as if commenced by writ.

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At p. 429 Stamp J expressed his view on the purpose of complying with O. 5 r. 2(b) of the RSC where a claim is based on allegation of fraud in the following words:

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The whole point of insisting that certain proceedings, and more particularly proceedings involving or based on an allegation of fraud, shall be begun by writ is to ensure that the procedure consequent upon the issue of the writ involving pleadings, discovery and so on, is followed.

If I allowed the amendment which is sought upon the terms of the action continuing as if it had been commenced by writ, I would accomplish precisely that result.

g

In an earlier case where fraud was alleged although relied on as an alternative, Ungood-Thomas J took even a more stringent view on the application of O. 5 r. 2(b) and refused to allow the proceedings commenced by originating summons to continue as if begun by writ pursuant to O. 28 r. 8(1). See *In re 462 Green Lane, Ilford Gooding v. Borland* [1971] WLR 138. The brief facts of that case are as follows. The plaintiff, Edwin Julian Gooding, of 462, Green Lane, Ilford, Essex ("the proprietor") was registered on 2 December 1962, as the proprietor of the freehold land known as 462, Green Lane, Ilford, comprised in title No. EX 42887 ("the land"). On 15 March 1968, a caution was registered under s. 54 of the Land Registration Act 1925, in favour of the defendant, Ernest Courtney Borland, of Bedford Hill, London, SW ("the cautioner").

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a The cautioner in his statutory declaration in support of his caution declared that on 19 January 1968, a contract for the sale of the land was made between the proprietor and himself and that he had paid £247 3s. to the proprietor.

Pursuant to r. 218 of the Land Registration Rules 1925, the proprietor applied for notice under s. 55 of the Act of 1925 to be served for warning-off the cautioner. The notice was served and the cautioner objected to the cancellation of the caution.

b On 30 September 1968, the Chief Land Registrar made an order under RSC, O. 93 r. 10 and r. 220(4) of the Rules of 1925 requiring the proprietor to take out, within eight weeks of the date of the order, an originating summons for bringing the matter before the Court and, in particular, for determining whether the caution should continue to have effect or be cancelled.

c On 14 November 1968, the proprietor took out the present summons. In his evidence the plea of *non est factum* was taken in respect of the contract; in the alternative he alleged fraud based on the same facts.

On 26 October 1970, when the matter came on for hearing, Ungood-Thomas J raised the point whether, bearing in mind the allegations of fraud and the provisions of RSC, O. 5 r. 2, the proceedings could be commenced by an originating summons and whether, in view of RSC, O. 28 r. 8, the proceedings could be ordered to continue as though commenced by a writ.

d At p. 140 the learned Judge expressed his view thus:

In those circumstances, therefore, in this case there must be pleadings; there must be discovery; the action must be at least continued as though it had begun by writ.

e This is not a technicality; it is most important matter of substance because it is only by this means that the parties can see perfectly clear what are the serious issues involved and be sure of having made available to them by discovery all the relevant documentary evidence which generally plays such an important part in these cases. Commencing the proceedings by writ would in the circumstances of this case involve only the very small additional expenditure of issuing the writ, and on the rules as they stand it seems to me that the requirement does exist that where, as here, there is an allegation of fraud, the proceedings must be so started and cannot be continued as though commenced by writ when in fact commenced by originating summons.

f

However, Stamp J in *In re Deadman, Decd (supra)* disagreed with the learned Judge because he thought Ungood-Thomas J's attention was not drawn to O. 2 r. 1(3) which provides:

g The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

At p. 429 Stamp J expressed his view on this matter in the following words:

h The existence of this sub-rule does, I think assist me to come to the conclusion that the inclusion now of a claim which would have required the action to have been brought by writ is not fatal to the continuance of the action. To some extent this has led me to come to the conclusion which I have expressed.

i With respect, we agree wholly with Stamp J's observation in *In re Deadman's* case and his comments on Ungood-Thomas J's decision in *In re Green Lane's* case and in our view his ruling in *In re Deadman's* case is relevant and equally applicable to the present case just as *Tay Beng Chuan's* case is similarly applicable in so far as it decides that the procedure under O. 28 r. 8(1) is the appropriate procedure to adopt in the case such as ours. Since it is our view that the point on procedure and practice is the dominant and crucial issue in this appeal

and would conclusively decide the result of this appeal, it would not be necessary for us to deal with the other grounds of appeal relating to the substantive matters which are the subject of the proceedings in the High Court.

We have given anxious considerations to the facts of this case and submissions of both Counsel on the point under discussion, and in the light of the view that we have taken and the uncertainties of the various facts as they are made available before the Court, and in view of the authorities cited above, we have come to the conclusion that the better decision under the circumstances is to allow the appeal, and pursuant to O. 28 r. 8(1) order the proceedings to continue as if begun by writ and the parties to deliver their pleadings in accordance with O. 18 and that the order made by the learned Judge should be set aside.

The appellants are awarded costs of this appeal but the costs in the Court below are to abide by the result of the fresh hearing which should be dealt with by another Judge.

Also found at [1992] 3 CLJ 1685

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